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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 745

JULIUS ALLEN,

Petitioner,

vs.

NATIONAL TUBE COMPANY,

a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO
and
BRIEF IN SUPPORT THEREOF.

Jerry Levin,
Counsel for Petitioner.

Levin & Levin,
Cleveland Trust Building,
Lorain, Ohio,
Of Counsel.

INDEX.

Opinions Below 1

Jurisdiction 2

History of the Case 2

Statement of the Case 2

Questions Presented 4

Statutes Involved 5

Reasons for Granting the Writ 6

Conclusion 12

TABLE OF AUTHORITIES.

Cases.

Adams v. Republic Steel, 254 Ala. 620, 49 So. 2nd 414 ..... 9, 10

American Communications Assn. v. Douds, 339 U. S. 382, 70 S. Ct. 674 8

Brotherhood of Rwy. Trainmen v. Howard, 343 U. S. 768, 72 S. Ct. 1022 7

Case v. National Labor R. Board, 321 U. S. 332, 64 S. Ct. 576 ..... 7, 9

Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282 ..... 7, 9, 10

National Licorice Co. v. N. L. R. B., 309 U. S. 350, 60 S. Ct. 569 11

Ochoa v. Hermandez y Morales, 230 U. S. 139, 33 S. Ct. 1033 8

Steele v. Louisville & N. R. Co., 323 U. S. 192, 65 S. Ct. 226 ..... 7, 8, 9, 10, 11

Tunstall v. Brotherhood of Locomotive, etc., 323 U. S. 210, 65 S. Ct. 235 ---- 7

Wallace Corp. v. National Lab. Rel. Bd., 323 U. S. 248, 65 S. Ct. 238 ---- 7

Constitution.

Fifth Amendment, U. S. Constitution ---- 8

Statutes.

National Labor Relations Act (29 U. S. C. Sec. 151-168)

Section 151 ---- 5, 8

Section 158(b)(2) ---- 6

28 U. S. C., Section 1257(3) ---- 2

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO and BRIEF IN SUPPORT THEREOF.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on January 28, 1953.

OPINIONS BELOW.

The written opinion of the Common Pleas Court is unreported. It appears on pages 13 through 18 of the printed record.

The written opinion of the Court of Appeals for the Ninth Judicial District of Ohio, Lorain County, is unreported and it appears at pages 20 through 27 of the printed record.

The opinion of the Supreme Court of Ohio is reported in 158 O. S. 584 and also appears at page 32 of the printed record.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on January 28, 1953 (R. p. 29). The jurisdiction of this Court is invoked under Title 28, U. S. C. Section 1257(3).

HISTORY OF THE CASE.

This action was filed in the Common Pleas Court of Lorain County, Ohio, by Julius Allen against the National Tube Company to recover retroactive inequity pay alleged to be due him under a contract entered into by the National Tube Company and the United Steelworkers of America —C. I. O.

The third amended petition of the plaintiff sets forth four causes of action: (1) for a declaratory judgment to have the court interpret the collective bargaining agreement set forth in the pleading; (2) a claim for work and labor based on the contract; (3) a claim in quasi contract on the theory of unjust enrichment; (4) a class action.

A demurrer was sustained to the third amended petition, and the plaintiff not desiring to plead further, final judgment was entered.

The judgment of the lower court was sustained by the Court of Appeals. The Supreme Court of Ohio overruled plaintiff's motion to certify the record and dismissed his appeal on a constitutional question.

STATEMENT OF THE CASE.

The pertinent facts are as follows: The National Tube Company, at its Lorain, Ohio plant, employs about 11,500 men in its production department. These men were organized by the United Steelworkers of America—C. I. O., which was certified by the National Labor Relations Board as the collective bargaining representative.

On November 25, 1944, the National War Labor Board issued a directive to the steel industry to negotiate the elimination of wage rate inequities. On March 13, 1945, pursuant to this directive, the company and the union entered into an agreement to negotiate the elimination of these inequities and agreed that any adjustments made would be effective as of January 4, 1944. On January 13, 1947, the company and the union entered into a supplemental agreement fixing the inequity pay at three and five-eighths cents per hour, and providing for the calculation of the lump sum payments to the individual employees on the payroll from January 4, 1944 until the date that the standard hourly wage scales were officially established (February 1, 1947). The agreement further provided, and this is the clause in dispute:

> "(5) The foregoing lump sum payments shall be made to employees who are on the plant payroll on the date the plant standard hourly wage scales are officially established, and to former employees who are not on the plant payroll on the date the plant standard hourly wage scales are officially established provided such former employees file individually signed requests therefor in writing with the Company within 120 days after February 1, 1947."

Plaintiff was an employee of the defendant and a member of the union on March 13, 1945. On January 13, 1947, he was not an employee of defendant or a member of the union. He failed to make a written request for his inequity pay, which has been calculated at $108.47, within 120 days after February 1, 1947. He had no knowledge of the supplemental agreement within 120 days after February 1, 1947. He received no notice from defendant, or otherwise, of said agreement or his rights thereunder within 120 days after February 1, 1947. A request in

writing was seasonably filed after receiving knowledge of the agreement of January 13, 1947.

Plaintiff claims that the union had no authority to negotiate for the 120-day limitation clause; that its sole authority was to negotiate the elimination of wage rate inequities under the agreement of March 13, 1945; that the requirement of a request in writing from former employees is discriminatory; that the 120-day limitation clause is contrary to statute of limitation for such claims; that the failure to give notice of the 120-day clause is in violation of due process; that the interpretation adopted by the Ohio courts of the 120-day clause works a forfeiture in favor of defendant of money earned by plaintiff, whereas the contract contains no such forfeiture clause.

QUESTIONS PRESENTED.

1. Does the National Labor Relations Act impose upon a labor organization acting by authority of the statute as the exclusive representative of a class of steelworkers, the duty to represent all employees, present and former, without discrimination?

2. May such representative and the employer, in the settlement of retroactive wage rate inequities, impose a requirement on former employees, not imposed on present employees, that they make written demand for retroactive pay within 120 days after the agreement is consummated?

3. If such discrimination is permissible, does not this contract violate the due process clause of the federal constitution in failing to provide for reasonable notice to former employees?

4. Does not the 120-day clause violate the public policy of the United States?

5. Is the beneficiary of a collective bargaining agreement negotiated by a bargaining representative certified by the National Labor Relations Act bound absolutely by the acts of such representative and the terms of the agreement, or may he challenge the agreement where there is unfair discrimination, the exercise of power beyond granted authority and a taking of property rights without notice in violation of due process?

There are also involved in this case questions as to the right of a former employee to a declaratory judgment to interpret the contract and to maintain a class action to recover the benefits provided in the contract for himself and others similarly situated.

Shall the 120-day requirement be construed as a forfeiture, in the absence of express language, or merely as a requirement that written demand be made before suit is instituted?

Is the company holding these funds as the trustee of a constructive trust?

If plaintiff cannot recover on the contract, may he recover in quantum meruit or in quasi-contract under the theory of unjust enrichment?

STATUTES INVOLVED.

This case involves an interpretation of the National Labor Relations Act, Title 29, U. S. C. Sections 151-168, and especially of the last paragraph of Section 151, which reads as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association,

self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

and Section 158(b)(2) which reads as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

REASONS FOR GRANTING THE WRIT.

The questions presented by this case are substantial. They involve an interpretation of the National Labor Relations Act as to the extent of authority of the collective bargaining representative and the extent to which a discriminatory agreement entered into by the collective bargaining representative is binding upon the beneficiaries. The questions involved are of widespread importance, involving as they do the rights of thousands of men engaged in the steel industry in various states. The rights of hundreds of former employees of defendant at Lorain are vitally affected by this decision. The rights of thousands of former employees of the steel industry are involved.

The questions presented have been decided by the courts of Ohio in this case in a way probably not in accord with the applicable decisions of this Court, especially the following cases:

Case vs. National Labor R. Board, 321 U. S. 332, 64 S. Ct. 576;

Steele v. Louisville & N. R. Co., 323 U. S. 192, 65 S. Ct. 226;

Tunstall v. Brotherhood of Locomotive, etc., 323 U. S. 210, 65 S. Ct. 235;

Wallace Corp. v. National Lab. Rel. Bd., 323 U. S. 248, 65 S. Ct. 238;

Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282;

Brotherhood of Railway Trainmen v. Howard, 343 U. S. 768, 72 S. Ct. 1022.

1. The Railway Labor Act imposes on the exclusive collective bargaining agent the duty to represent all employes, present and former, without discrimination.

Steele v. Louisville & N. R. Co., supra.

The same principle of law is equally applicable to the duty of the exclusive collective bargaining agent under the National Labor Relations Act.

2. Variations in the terms of the contract based on differences relevant to the contract are permissible under the decision in the *Steele* case.

Under the contract, present employees receive their retroactive pay without any action on their part; upon former employees is imposed the obligation to make a request in writing and within 120 days. Both present and former employees had equally earned their retroactive inequity pay and were equally entitled thereto.

This is a discrimination based on no relevant difference and is not authorized by Congress.

Steele v. Louisville & N. R. Co., supra.

3. The right to the retroactive inequity pay became vested by virtue of the agreement of March 13, 1945.

There remained only to be determined the amount of such further pay. But for the agreement to pay such additional wages, the employees might have refused to work. This was apparent to the President in issuing the Directive to enter into an agreement to negotiate for the inequity pay. It was a vested property right which could not be taken away without due process of law under the Fifth Amendment to the Constitution of the United States. No notice of this clause was given to the former employees. As stated in *Ochoa v. Hermandez y Morales*, 230 U. S. 139, 33 S. Ct. 1033, "all authorities agree that it (due process) inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

4. Congress has granted vast authority to the collective bargaining representative, the exercise of which powers is closely akin to the exercise by the government itself. The public interest in the proper exercise of that power is very great.

American Communications Asso. v. Douds, 339 U. S. 386, 70 S. Ct. 671.

By virtue of Section 151 of the National Labor Relations Act, the public policy of the United States is involved. That public policy is violated by the action of the collective bargaining representative in agreeing to the clause which discriminates against former employees.

Steele v. Louisville & N. R. Co., supra.

5. Congress, in enacting the National Labor Relations Act did not intend to confer plenary power upon the bargaining representative to sacrifice for its members the rights of the former employees.

Steele v. Louisville & N. R. Co., supra.

The case of *Steele v. Louisville & N. R. Co., supra,* came into this Court by certiorari from the Supreme Court of Alabama and presented the question as to whether the Railway Labor Act imposes upon the labor organization, acting by authority of the statute as exclusive bargaining representative, the duty to represent all employees in the craft without discrimination, because of race, and if so, whether the courts have jurisdiction to protect a minority from the violation of such obligation. The Alabama court had ruled that the bargaining representative had the power to enter into the agreement with the railroad company, and that the contract as thus entered into fixes the obligations of the parties. This Honorable Court, in reversing the Alabama court, held that the Railway Labor Act imposes on the bargaining representative the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts without hostile discrimination; that the only variations permissible are those based on differences relevant to the authorized purposes of the contract.

The first case requiring an interpretation of the 120-day clause in the January 13, 1947 wage rate inequity steel contract to reach a court of last resort in any state was an Alabama case: *Adams v. Republic Steel,* 254 Ala. 620, 49 So. 2nd 414. In that case, in face of the reversal in the *Steele* case, the Alabama Supreme Court reiterated its view that the union as the bargaining representative had the power to contract with the company; that the contract thus entered into fixes the rights of the employees; it assumes that the union was empowered to enact the 120-day limitation clause. It cites as authority the cases of *Steele v. Louisville & N. R. Co., supra; Case v. National Labor R. Board, supra; Elgin, J. & E. Ry. Co. v. Burley,*

supra. The opinion rendered by the Alabama court is a misapplication of the principles of law enunciated by this Honorable Court in the cases cited. In the *Steele* case, and in the *Elgin* case, this Court spelled out the limitations upon the authority of the collective bargaining representative and his duty to act without discrimination. It is pointed out that the employer is presumed to have knowledge of the limitations upon authority of the bargaining representative.

The decision of the Alabama Supreme Court in the *Adams* case was heavily relied upon by counsel for the respondent in their brief and argument before the Ohio courts (the opinion was set forth *in toto* in respondent's briefs), and undoubtedly greatly influenced the decision made by the Ohio courts.

The Supreme Court of Ohio in the case at bar rendered no opinion. The Court of Appeals in the case at bar, as appears from the written opinion (R. p. 20) adopts the reasoning of the *Adams* case and holds that the only right which the plaintiff possesses arose solely and by virtue of the agreement of January 13, 1947, which he must accept *in toto;* that his retroactive inequity pay is to be paid to him only in accordance with the terms of that agreement, one of the terms of which is the 120-day limitation clause with which plaintiff has concededly not complied.

Whether the 120-day clause is discriminatory, whether it is in violation of due process, whether it is in excess of the authority of the bargaining agent, whether it is a taking of property without due process of law, are not considered or discussed by the Ohio courts or by the Alabama court. The Ohio Court of Appeals, in reviewing this case, considered it solely as a question of private con-

tract law without any reference to the federal statutes, the public interest, or the public policy involved. No heed is given to the decisions of this Court. A labor contract is not a private contract. *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 60 S. Ct. 569. The bargaining representative acts for all employees, non-members and former employees. *Steele v. Louisville & N. R. Co., supra.* He is in a position where there may be a conflict of interests, in a position where it may be a bargaining advantage to discount the rights of minorities. We believe the principle of law has been clearly laid down by this Court that the bargaining representative must act fairly and impartially and without hostility to any of those whom he represents; that when he discriminates the contract, to the extent that it infringes upon the rights of minorities, is invalid. We believe it is important that this principle of law be clearly spelled out to the state courts which are considering the precise question involved in this case. The principles of law involved in this case are important. These principles have been misconstrued by the state courts.

A review of this case is important not only to correct the error which has been committed against the plaintiff and the several hundred persons whom he represents in the case at bar, but also to clear up this point of law for the other cases now pending involving the exact question. Such cases are pending in the courts of Ohio, Michigan and Alabama. Further, the principles of law involved here must necessarily arise in similar situations. They are of sufficient importance and widespread interest to merit review by this Honorable Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEVIN & LEVIN,

By JACOB LEVIN,

Attorneys for Petitioner.

20

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BRIEF OF RESPONDENT OPPOSING CERTIORARI.

FRANK HARRISON,
Counsel for Respondent,
National Tube Company.

SQUIRE, SANDERS & DEMPSEY,
1857 Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

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TABLE OF CONTENTS.

Essence of Company's Response 1

Correcting Petitioner's History and Statement of the Case 1

Petitioner's Questions Are Not Presented by the Record 3

No Meritorious Question is Presented 4

APPENDIX. Excerpt Taken From Brief of United Steelworkers of America in the Case of *Manley, et al. vs. Truscon Steel Company, et al.*, No. 128209, Mahoning County Court of Common Pleas of Youngstown, Ohio 7

TABLE OF CASES.

Adams v. Republic Steel Corporation, 254 Ala 620, 49 So. 2d 214 5

Manley, et al. v. Truscon Steel Company, et al., No. 128209, Mahoning County Court of Common Pleas of Youngstown, Ohio 6, 7

Steele v. L. & M. R. Co., 323 U. S. 192 5

Stewart v. Gordon, 60 O. S. 170 6

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BRIEF OF RESPONDENT OPPOSING CERTIORARI.

ESSENCE OF COMPANY'S RESPONSE.

The respondent, National Tube Company, maintains that the petition for writ of certiorari does not present any federal question of substance. Only questions of contract law and state court procedure are presented.

CORRECTING PETITIONER'S HISTORY AND STATEMENT OF THE CASE.

The petitioner's third amended petition (Record, pages 5-10) sets forth that on January 13, 1947, the respondent and the union recited that they had agreed to limit "lump sum payments" for the period backward to January 4, 1944 (1) to a total expenditure not exceeding an amount equal to an *average* of 3⅝¢ per employee hour, (2) to such a maximum "calculated and disbursed *in accordance with the provisions of this Agreement.*" And then the presently pertinent provision of said Agreement is that—

"(5) The foregoing lump sum payments shall be made to employees who are on the plant payroll on the date the plant standard hourly wage scales are officially established, *and to former employees who are not on the plant payroll on the date the plant standard hourly wage scales are officially established* **provided such former employees file individually signed requests therefor in writing with the company within 120 days after February 1, 1947.**" (Emphasis ours.)

Plaintiff-petitioner concedes, indeed alleges, that he was a former employee who did not file a written request within 120 days after February 1, 1947 for a lump-sum payment, but if he had, the defendant-respondent calculated that $108.47 would have been due him.

The petitioner's brief, page 2, states that the action was "to recover retroactive inequity pay alleged to be due him *under a contract* entered into by" the respondent and a CIO union of which the petitioner had been a member and that the first cause of action was "for a declaratory judgment to have the court interpret the collective bargaining agreement set forth in the pleading." Actually, the conclusion of the first cause of action is: "9. That said agreement of January 13, 1947 ought to be *reformed in equity by deleting the 120 days clause* contained in paragraph (d) 5 thereof." (Record page 9; emphasis, ours.)

The Steel Commission on January 27, 1947 unanimously approved the contract of January 13, 1947 "as discharging the obligations of the parties under Sections X-3 and XI of the National War Labor Board's Directive Order of November 25, 1944 * * *." (Report of Steel Commission, March 30, 1945—June 26, 1947, pages 13a-13c.) This commission, composed of two representatives of labor, two of management and two of the public had succeeded

to the power of the NWLB in relation to the steel industry and could interpret or even alter NWLB orders and directives. (DLR No. 221: A-14; Executive Order No. 9672: 11 F. R. 221; Executive Order No. 9809, par. 10 (d): 11 F. R. 14281.)

PETITIONER'S QUESTIONS ARE NOT PRESENTED BY THE RECORD.

The petitioner's brief, pages 4-5, numbers five and adds more unnumbered questions, the last of which is "If plaintiff cannot recover *on the contract,* may he recover in *quantum meruit* or in *quasi*-contract under the theory of unjust enrichment?" (Emphasis, ours.) One different question has been considered in the Ohio courts as being dispositive. That question is—

> An employer and a labor union acting as collective bargaining agent for employees, having agreed that the employer shall award calculable sums to such former employees as meet a specified condition precedent, may a court compel the employer to disregard the condition and to make payments to former employees who did not meet the condition? [Only if this question be answered in the affirmative would any other question arise such as whether one former employee could compel the employer to pay other former employees their awards.]

The petitioner's brief, pages 10-11, correctly states: "The Ohio Court of Appeals, in reviewing this case, considered it solely a question of private contract law * * *." The Supreme Court of Ohio on December 17, 1952, overruled petitioner's motion to certify the record and on January 29, 1953 dismissed his appeal "as of right," "*sua sponte,* no debatable constitutional question involved." (Record pages 29, 32.) None of the Ohio judges dissented.

NO MERITORIOUS QUESTION IS PRESENTED.

Even if the National Labor Relations Act or "the public policy of the United States" did not permit a labor union and an employer to discriminate on reasonable grounds between current and former employees, no court would have the right to adjudge the employer to be under an obligation to former employees which was dependent upon agreement between the union and the employer in the absence of such an agreement.

Even if the claim-within-120-days condition precedent were invalid on constitutional or other grounds or were valid only as to those with notice, that would not create an obligation in favor of such former employees which had not been created by the parties and otherwise was non-existent.

It cannot accurately be said that one forfeits anything not previously possessed nor that the courts have jurisdiction to convert language admittedly expressing the intention of the parties to an agreement into other language which nullifies their intention and raises a liability where none exists under the language used and intended.

If the respondent owed the plaintiff anything it would be by virtue of an agreement with the union and the respondent would pay such sum without any resort to the fiction of constructive trust. If the respondent does not owe anything under the contract then there is no *res* for a constructive trust.

The claim is for an award which is dependent upon a contract. It follows that if the award doesn't exist under the contract it couldn't conceivably exist in *quantum meruit, quasi*-contract or unjust enrichment.

The petitioner's fourth "cause of action" was an effort to recover on behalf of all other former employees of the respondent who had failed to file a claim within the limited

120 days. Whether the petitioner had such a right raised solely the substantive questions under his first three causes of action and a procedural question under Ohio laws as to circumstances justifying representative class suits.

None of the six decisions of this Court upon which the petitioner relies, according to page 7 of his brief, is remotely comparable with the effort of the petitioner in this case to reform the contract so that it will be contrary to the intention of the parties to the contract and then, as a third party beneficiary, recover on the revised contract. The opinion of the Supreme Court of Alabama in *Adams v. Republic Steel Corporation,* 254 Ala. 620, 49 So. 2d 214, and the opinion of the Court of Appeals in the case at bar (Record pages 20-26) so clearly show the inapplicability of the decisions of this Court upon which the petitioner relies that we do not deem it necessary to go further in order for it to appear that no federal question of substance is presented.

We wish, however, to say for the convenience of the court that in *Steele v. L. & M. R. Co.,* 323 U. S. 192, the decision most emphasized in petitioner's brief, the question was whether the Railway Labor Act imposes on a labor organization acting as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race. In this context, the Court said:

> "* * * *Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied,* * * *are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit.* * * * Here the discriminations based on race alone are obviously irrelevant and invidious." (p. 203; emphasis, ours.)

Under the statute, the union must represent non-union men or minority members without hostile discrimination. The employer may not take the *benefit* of a contract which the bargaining representative is prohibited by the statute from making.

It was very reasonable for the parties to impose strict provisions with respect to claims by "former employees" who in ordinary course would have scattered to many addresses; otherwise the employer might be forced to carry unknown amounts of liabilities for many years. The union's conception of the justification for the clause was stated in their brief in the *Manley v. Truscon Steel Company* case, as quoted in the appendix hereto, (*infra*, p. 7). Moreover, if the limitations were void, the whole would be void (Syllabus 3 of *Stewart v. Gordon*, 60 O. S. 170) and petitioner would continue to have no basis for a claim.

Respectfully submitted,

FRANK HARRISON,
SQUIRE, SANDERS & DEMPSEY,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Respondent, National Tube Company.

APPENDIX.

Excerpt Taken From Brief of United Steelworkers of America in the Case of Manley, et al. vs. Truscon Steel Company, et al., No. 128209, Mahoning County Court of Common Pleas of Youngstown, Ohio.

"*It is further elementary that by the device of reformation, a court of equity will not make a new contract for the parties. Stewart vs. Gordon,* 60 O. S. 170. Yet, that is exactly what the plaintiffs are asking this court to do. They are asking that the court make a new contract which does not include the 120-day limitation. The court no doubt will take judicial notice of the customary give-and-take of collective bargaining and can easily recognize that the 120-day limitation was part of a general settlement in which both sides of the controversy waived issues for which they were contending in the interest of amicable adjustment of the problem. Who can logically state what sort of contract would have been worked out without the 120-day limitation, or whether any contract would have been worked out without such 120-day limitation? As the court will note, one of the prime problems of the defendant corporation in these negotiations was the problem of fixing its wartime and post-war costs, for the corporation at the same time was dealing with the Army, Navy and other governmental agencies on renegotiation of its wartime contracts and also with the Treasury Department on fixing its income and excess profits tax liabilities for the wartime years. And, the court also will take notice that such negotiations and renegotiations involve statutes of limitations and other time limits whereby it is vital to the corporation that ultimately its total possible liability on the inequities payments be determined—and that was the motive for including the 120-day limitation. After that time, the corporation knew that its liability was at an end, that it could safely negotiate and renegotiate on the other matters referred to. We cannot state, nor can the court state, what sort of contract would have resulted without the 120-day limitation, yet that is exactly what plaintiffs seek to require this court to do."